IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs December 8, 2009

STATE OF TENNESSEE v. DONALD MOORE PUCKETT, III

Direct Appeal from the Criminal Court for Davidson County
Nos. 2008-C-2917, 2008-C-2854 Cheryl A. Blackburn, Judge

No. M2009-00548-CCA-R3-CD - Filed January 7, 2010

The defendant, Donald Moore Puckett, III, pled guilty in two separate cases to facilitation of theft of property and violation of the sex offender registration law for agreed-upon Range II sentences of six years and two years, respectively, to be served concurrently. Following a sentencing hearing, the trial court denied the defendant's request for an alternative sentence, the denial of which he now appeals. After review, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

ALAN E. GLENN, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

Dwight E. Scott, Nashville, Tennessee, for the appellant, Donald Moore Puckett, III.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Jeff Burks, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

The defendant was indicted in case number 2008-C-2854 for theft of property in an amount between $10,000 and $60,000, a Class C felony. He was also indicted in case number 2008-C-2917 for violation of the sex offender registration law, a Class E felony. On January 15, 2009, he pled guilty to the lesser offense of facilitation of theft of property, a Class D felony, in case number 2008-C-2854 and pled guilty as charged in case number 2008-C-2917.[1]

The underlying facts presented by the State at the guilty plea hearing were as follows:

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[1] Another case, number 2007-B-1614, was dismissed as part of the plea.

> [S]tarting on 2008-C-2917, the State's proof at trial against [the defendant] is that he has a statutory rape conviction in the State of Missouri. He moved to Tennessee and was required to report annually on his birthday and did not do so as of December the 17th of 2007. He's required to report no later than seven days after his birthday. And as of December 17th, 2007, he had not reported, and it violated the requirements of the sex offender registry.
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> With regard to 2008-C-2854, . . . the State's proof would be that on 11-3-07 this defendant and Donnie Max Daughtery . . . answered an ad for the sale of a motorcycle. The proof would be that [the defendant] drove Mr. Daughtery there. The value of the motorcycle was over $10,000. Basically Mr. Daughtery cajoled the owner of the motorcycle to crank it up and let him take a test drive on it at which point Mr. Daughtery drove off on it. That would be the State's proof. This was without the consent of the victim. He would value the property at over $10,000.

As part of his plea, the defendant agreed to a six-year sentence on the facilitation of theft conviction and a two-year sentence on the failure to register conviction, to be served concurrently. The manner of service of the sentence and whether it would be served concurrently or consecutively to previously imposed Sumner County sentences were to be determined by the trial court following a sentencing hearing.

At the sentencing hearing, the twenty-seven-year-old defendant testified that he was presently in custody in Sumner County serving an effective ten-year sentence at thirty-five percent, "two years day for day with a yearlong drug treatment." He said that the underlying charges in Sumner County involved theft and evading arrest, not violence against a person. The defendant stated that his legal problems stemmed from his abuse of drugs and alcohol, which began when he was twelve years old. He said that he had never received any kind of drug or alcohol treatment, although he had tried to get treatment but had "always been put in juvenile or other places." He elaborated that he had tried to receive treatment in the past from Bradford Health Center and knew that he would benefit from a treatment program.

The defendant testified that the reason he took the plea in Sumner County was because he knew he had a drug problem and had been using "[c]ocaine, crack, heroin, ecstasy. Anything [he] could really use." He said that he wanted to get off drugs and was willing to devote his life to quitting. As part of his plea in Sumner County, he was supposed to attend a year-long drug treatment program in Memphis, but he could not be furloughed due to the charges in the present case. As an alternative, he was supposed to attend a six-month inpatient program through the Salvation Army in Nashville, followed by three months of outpatient treatment. After completing his drug treatment, the defendant was to be placed on community corrections in Sumner County.

The defendant testified that he had been placed on probation in Missouri when he was seventeen years old, but his probation was violated because of drug use. Therefore, he had to serve five years in the penitentiary. He said that he would live with his mother if the trial court agreed to

suspend his sentence in the present case and would work for a fence company. The defendant stated that he did not have a high school diploma or GED but obtaining such was part of his community corrections requirements. He said that drugs led to his convictions in this case.

On cross-examination, the defendant admitted that he had a conviction for statutory rape in Missouri. He explained that he had moved from Tennessee to Missouri to live with his sister because he wanted to get off drugs and his girlfriend was about to have a child. He admitted that he had burglary and theft convictions in Missouri for which he received the sentence of probation that he violated. He said that he was released in May 2005 and began using drugs again in 2006 "about a year after [his] brother died in Iraq."

The defendant testified that the Sumner County and present offenses occurred in the fall of 2007. He explained that with regard to the theft in this case, he did not know that Donnie Daughtery was going to steal the motorcycle. The defendant said that Daughtery asked him to stay with the victim while Daughtery test-drove the motorcycle. However, Daughtery called him while on the test-drive to say he was not coming back, and the defendant "took off because [he] had warrants in Sumner County."

Asked by the court whether he had ever gotten any help for his drug problem when he was out on his own, the defendant said he had not "[b]ecause at the times, . . . [he] was doing so much drugs . . . [he] had that attitude where [he] didn't care." He said that he had tried to get help as a juvenile, but "when [he] got out of prison and [his] brother died, [he] kind of went crazy."

Mary Puckett, the defendant's mother, testified that the defendant would be able to live with her when he was released. She said that she would assist him in complying with any conditions of release imposed on him and with his drug treatment. She stated that she had tried to help him with drug treatment when he was a juvenile, but she did not have enough money to keep in the Bradford Health Center.

In sentencing the defendant, the trial court first found no basis for ordering that the sentences be served consecutively to the previously imposed Sumner County sentences. The trial court then denied the defendant's request for an alternative sentence, finding that he had a history of criminal conduct and that measures less restrictive than confinement had been applied unsuccessfully to him. The court also noted that the defendant had not made any efforts to receive help on his own.

ANALYSIS

The defendant argues that the trial court erred in denying him an alternative sentence. When an accused challenges the length and manner of service of a sentence, it is the duty of this court to conduct a *de novo* review on the record "with a presumption that the determinations made by the court from which the appeal is taken are correct." Tenn. Code Ann. § 40-35-401(d) (2006). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823

S.W.2d 166, 169 (Tenn. 1991). The presumption does not apply to the legal conclusions reached by the trial court in sentencing the accused or to the determinations made by the trial court which are predicated upon uncontroverted facts. State v. Butler, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); State v. Smith, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994); State v. Bonestel, 871 S.W.2d 163, 166 (Tenn. Crim. App. 1993), overruled on other grounds by State v. Hooper, 29 S.W.3d 1, 9 (Tenn. 2000).

In conducting a *de novo* review of a sentence, this court must consider (a) any evidence received at the trial and/or sentencing hearing, (b) the presentence report, (c) the principles of sentencing, (d) the arguments of counsel relative to sentencing alternatives, (e) the nature and characteristics of the offense, (f) any mitigating or enhancement factors, (g) any statistical information provided by the administrative office of the courts as to Tennessee sentencing practices for similar offenses; (h) any statements made by the accused in his own behalf; and (i) the accused's potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-103, -210 (2006); State v. Taylor, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001). The party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401 (2006), Sentencing Commission Cmts.; Ashby, 823 S.W.2d at 169.

A defendant who receives a sentence of ten years or less is eligible for probation, subject to certain exceptions. Tenn. Code Ann. § 40-35-303(a) (2006). Even if eligible, however, the defendant is not automatically entitled to probation as a matter of law. See Tenn. Code Ann. § 40-35-303(b). The burden is on the defendant to show the denial of probation was improper. Id.; see also State v. Summers, 159 S.W.3d 586, 599-600 (Tenn. Crim. App. 2004) (citing Ashby, 823 S.W.2d at 169); State v. Baker, 966 S.W.2d 429, 434 (Tenn. Crim. App. 1997) (stating that "[a] criminal defendant seeking full probation bears the burden on appeal of showing the sentence actually imposed is improper, and that full probation will be in both the best interest of the defendant and the public").

There is no bright line rule for determining when a defendant should be granted probation. State v. Bingham, 910 S.W.2d 448, 456 (Tenn. Crim. App. 1995), overruled on other grounds by Hooper, 29 S.W.3d at 9-10. Every sentencing decision necessarily requires a case-by-case analysis. Id. Factors to be considered include the circumstances surrounding the offense, the defendant's criminal record, the defendant's social history and present condition, the need for deterrence, and the best interest of the defendant and the public. State v. Goode, 956 S.W.2d 521, 527 (Tenn. Crim. App. 1997). Another appropriate factor for a trial court to consider in determining whether to grant probation is a defendant's credibility or lack thereof, as this reflects on the defendant's potential for rehabilitation. Id. Also relevant is whether a sentence of probation would unduly depreciate the seriousness of the offense. See State v. Davis, 940 S.W.2d 558, 559 (Tenn. 1997); Bingham, 910 S.W.2d at 456.

To qualify for placement in a community corrections program, an offender must meet all of the following criteria:

(A) Persons who, without this option, would be incarcerated in a correctional institution;

(B) Persons who are convicted of property-related, or drug-or alcohol-related felony offenses or other felony offenses not involving crimes against the person as provided in title 39, chapter 13, parts 1-5;

(C) Persons who are convicted of nonviolent felony offenses;

(D) Persons who are convicted of felony offenses in which the use or possession of a weapon was not involved;

(E) Persons who do not demonstrate a present or past pattern of behavior indicating violence; [and]

(F) Persons who do not demonstrate a pattern of committing violent offenses[.]

Tenn. Code Ann. § 40-36-106(a)(1).

Alternatively, the "special needs" provision provides that an offender may be considered eligible for community corrections, even if usually considered unfit for probation, if he has a history of chronic alcohol or drug abuse, or mental health problems, but his special needs are treatable and could be served best in the community instead of in a correctional institution. Id. § 40-36-106(c). Even where a defendant meets the eligibility requirements of the statute, the defendant is not automatically entitled to participate. See State v. Ball, 973 S.W.2d 288, 294 (Tenn. Crim. App. 1998).

Under the revised Tennessee sentencing statutes, a defendant is no longer presumed to be a favorable candidate for alternative sentencing. State v. Carter, 254 S.W.3d 335, 347 (Tenn. 2008) (citing Tenn. Code Ann. § 40-35-102(6) (2006)). Instead, the "advisory" sentencing guidelines provide that a defendant "who is an especially mitigated or standard offender convicted of a Class C, D or E felony, should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6) (2006). We note that as a Range II multiple offender, the defendant did not qualify for favorable status consideration for alternative sentencing options. See id.; Carter, 254 S.W.3d at 347.

A trial court may deny alternative sentencing and sentence a defendant to confinement based on any one of the following considerations:

(A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

(B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

Tenn. Code Ann. § 40-35-103(1) (2006). Furthermore, the defendant's potential for rehabilitation or lack thereof should be examined when determining whether an alternative sentence is appropriate. Id. § 40-35-103(5).

As noted above, the trial court based its denial on the defendant's history of criminal conduct, that measures less restrictive than confinement had been applied unsuccessfully to the defendant, and that the defendant had never tried to receive treatment for his drug problem on his own. We agree with the defendant that one would be hard-pressed to say measures less restrictive had been "frequently or recently" applied unsuccessfully in that his only probation violation evidently occurred approximately nine years ago.

Regardless, the record supports the trial court's denial of an alternative sentence. It appears from the presentence report that the defendant accrued at least six felonies over an eight-year period, during which period he was incarcerated for five years. As to the defendant's general social history, he did not graduate from high school and has not earned a GED. He reported that he had been self-employed for the past three and a half years "doing fences," but the presentence report officer could not verify that information. The defendant admitted that he started using marijuana and drinking alcohol at the age of twelve, using crack at the age of sixteen, and thereafter using any kind of drug he could find, including "[c]ocaine, crack, heroin, [and] ecstasy." Although he claims that he is an excellent candidate for rehabilitation because he wants to stop using drugs, the defendant acknowledged that he had never attempted to get help for his drug problem when he was out on his own. In addition, it is not clear that the defendant was even eligible for placement in community corrections as he was serving a sentence of incarceration in Sumner County at the time of consideration in Davidson County, see Tenn. Code Ann. § 40-36-106(a)(2); Op. Tenn. Att'y Gen. No. 00-078 (Apr. 27, 2000), and he has failed to prove that the denial of probation was improper. We conclude that the trial court did not err in sentencing the defendant to confinement.

CONCLUSION

Based on the foregoing authorities and reasoning, we affirm the judgments of the trial court.

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ALAN E. GLENN, JUDGE